



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: June 22, 2009

CBCA 1149

SIXTH AND E ASSOCIATES, L.L.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard D. Lieberman and Gabriel D. Soll of McCarthy, Sweeney & Harkaway, P.C.,
Washington, DC, counsel for Appellant.

Robert M. Notigan, Office of Regional Counsel, General Services Administration,
Philadelphia, PA, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **KULLBERG**.

VERGILIO, Board Judge.

On April 14, 2008, the Board received from Sixth and E Associates, L.L.C. (lessor) a notice of appeal disputing a contracting officer's decision dated March 7, 2008. The Tax Adjustment clause (September 2000) of the underlying lease, GS-11B-01864, with the General Services Administration (agency), provides for an adjustment each year to Government payments of real estate taxes calculated using the "base year taxes" defined as the real estate taxes for the first twelve-month period coincident with full assessment or an amount negotiated by the parties. The dispute concerns the interpretation and application of the clause.

The lessor timely brings this appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended. The evidentiary record includes the appeal file and supplement, the transcript from a hearing on the merits, and exhibits accepted during the hearing and attached to the lessor's brief.

The parties did not negotiate an amount to reflect the base year taxes for the fully assessed property. Therefore, the “base year taxes” are the real estate taxes for the first twelve-month period coincident with full assessment. This property was fully assessed at the time the lease was effective. The first twelve-month period coincident with full assessment is the first twelve months of the lease, i.e., February 22, 2004, through February 21, 2005. The lessor’s interpretation, predicated on a tax year basis from October 1, 2003, through September 30, 2004, is inconsistent with the lease. The Board denies the appeal.

Findings of Fact

1. On March 3, 2006, the lessor and agency entered into a lease covering the ten-year term beginning February 22, 2004, and ending on February 21, 2014, for the entire space in a building. The lease specifies dollar amounts of annual rent for three periods: (1) February 22, 2004, to February 28, 2005, (2) March 1 to September 30, 2005, and (3) October 1, 2005, to February 21, 2014. For each period, the lease specifies that the annual rent includes base real estate taxes. Exhibit 1 at 1 (exhibits are in the appeal file unless noted otherwise).

2. Under the lease’s Tax Adjustment clause (September 2000), base year taxes “are 1) the real estate taxes for the first 12-month period coincident with full assessment or 2) may be an amount negotiated by the parties that reflects an agreed upon base for a fully assessed value of the property.” Exhibit 1 at 20 (§ 3.4.B). The clause specifies that the agency shall make a single annual lump sum payment for increases in real estate taxes over the base year taxes, or receive a rental credit or lump sum payment for decreases in real estate taxes below the base year taxes. Exhibit 1 at 21 (§ 3.4.E). It is undisputed that the property was fully assessed at the commencement of the lease term; the agency was the prior lessee of the space under two leases, with holdover periods occurring prior to the agreement reflected in the here-disputed lease. Transcript at 15-17, 94.

3. The parties did not negotiate an amount to reflect the base year taxes. Transcript at 35. Accordingly, the lease does not explicitly state an amount that the parties had negotiated to reflect base year taxes.

4. The lease includes the lessor-completed standard form 1217 (submitted with its offer), with a date of April 2, 2004. Under section II, captioned “estimated annual cost of ownership exclusive of capital charges,” on line 28, the lessor entered a dollar amount as its real estate taxes. Exhibit 1 at 3 (§ 7), 104. Although not specified on the form, the lessor states that the amount reflects the real estate taxes it paid for the building for the tax year of October 1, 2003, to September 30, 2004. Transcript at 35.

5. By letter dated June 8, 2007, the lessor submitted a certified claim to the contracting officer, seeking to recover (as here relevant) real estate taxes for 2005 and 2006. The lessor treats the Tax Adjustment clause as applicable to each tax year, as it asserts that the base year taxes are those assessed for the period of October 1, 2003, through September 30, 2004 (the tax year for payment of real estate taxes). To this base, the lessor compares taxes for the 2005 and 2006 tax years, and deems the agency obligated to pay the difference under the Tax Adjustment clause. Exhibit 2 at 1.

6. The contracting officer denied the claim, by decision dated March 7, 2008. In reaching the decision, the contracting officer notes that, with the property fully assessed at the inception of the lease term, the first twelve-months is from February 22, 2004, through February 21, 2005; that period establishes the base year taxes. The decision explains that the figure for real estate tax estimates on standard form 1217 does not represent a negotiated base year amount, and notes that the lessor's figure does not take into account the start date of the lease. Exhibit 5 at 2.

7. On April 14, 2008, the Board received the underlying notice of appeal from the lessor. Exhibit 6 at 3.

Discussion

The Tax Adjustment clause establishes the base year taxes as either a negotiated amount or the real estate taxes for the first twelve-month period coincident with full assessment. The parties did not negotiate an amount for the base year taxes under the clause. The lease does not identify such a negotiated amount. Although the lessor submitted a figure on a standard form identified as estimated real estate taxes, that inclusion as an estimate does not represent a negotiated amount.

Without a negotiated figure, the clause specifies how to determine the base year taxes. Here, the first twelve months with a full assessment of the property are the first twelve months of the lease--February 22, 2004, through February 21, 2005. The clause is not ambiguous. The lessor's interpretation, which imposes a tax year concept on the base year, is contrary to the express language of the clause. The lessor's interpretation fails.

The lessor raises other theories of relief, apart from the plain meaning of the lease. The lessor seeks reformation, contending that there was no meeting of the minds in this lease, because the parties had differing understandings of what the lease terms meant. There was a meeting of the minds, both parties intended to be bound by the terms and conditions of the lease. The misinterpretation of a provision by one party does not create a basis, by itself, to reform the terms of the lease.

The lessor looks to extrinsic evidence to demonstrate a prior course of dealing that compels a result contrary to the express language of the lease. The record does not establish a relevant prior course of dealing impacting the interpretation of this lease. This lease commenced with the property fully assessed. At the inception of the prior leases (containing varying tax escalation language), the property was not fully assessed. The first full assessment occurred on a tax year basis. The agency used supplemental lease agreements to establish the base year real estate taxes on a tax year basis. Supplemental Appeal File Exhibits 1, 2, 3. Because of the differences in language and circumstance between this lease and each prior lease, the prior course of dealing argument is inapplicable.

The lessor's unexpressed intents, understandings, and interpretations are not relevant to the interpretation of this lease. The Tax Adjustment clause unequivocally defines how the base year is to be established (with and without a negotiated amount). Despite the lease being agreed upon in 2006, when the lessor possessed real estate tax assessments not included in, or available at the time of, its offer, the lessor did not utilize the opportunity to negotiate a fixed amount for the base year real estate taxes or to specify a tax year based base year. The claim and appeal processes are not meant to provide forums for the parties to renegotiate the terms of an existing lease.

Decision

The Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

H. CHUCK KULLBERG
Board Judge